

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of Section 207 of the)
Telecommunications Act of 1996)

CS Docket No. 96-83

Restrictions on Over-the-Air)
Reception Devices: Television Broadcast)
and Multichannel Multipoint Distribution)
Service)

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To: The Commission

Comments of NYNEX Corporation

NYNEX Corporation ("NYNEX") submits these comments on the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding. Section 207 of the Telecommunications Act of 1996¹ (the "1996 Act") requires the FCC to preempt all state and local regulations that interfere with the federal interest of ensuring access to MMDS service. The Commission has proposed rules which go a long way towards implementing Section 207 of the 1996 Act. These rules, with certain modifications, will help establish a level playing field among competing video providers as well as encourage the growth of the emerging wireless cable industry.

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I. **The Establishment Of A Rebuttable Presumption Of
Unreasonableness For All Governmental Restrictions Is Appropriate**

NYNEX plans to launch a video service in the Boston area utilizing a digital Multipoint Multichannel Distribution System ("MMDS"). This wireless cable technology requires the

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 1996 U.S.C.A.N. (110 Stat.56).

integration of numerous facilities, including, for example, headend equipment, satellite receive dishes, transmission towers and rooftop antennas.²

Section 207 of the 1996 Act directs the Commission to “promulgate regulations to prohibit restrictions that impair a viewer’s ability to receive video programming services through devices designed for over-the-air reception of ...multichannel multipoint distribution service...”³

In implementing this statute, the Commission has established a rebuttable presumption of unreasonableness for governmental regulations that address MMDS antennas. The Commission’s proposed rule reads in pertinent part:

Any state or local zoning, land-use, building, or similar regulation, that affects the installation, maintenance, or use of devices designed for over-the-air reception of television broadcast signals or multichannel multipoint distribution service shall be presumed unreasonable and is therefore preempted subject to paragraph (a)(2).⁴

The 1996 Act requires the Commission to promulgate regulations to “prohibit” restrictions that “impair” a viewer’s ability to receive video programming services through devices designed for over-the-air reception of MMDS. As such, one could argue that Congress intended the Commission to establish a per se preemption of government regulations in this area, similar to those rules proposed for non-governmental bodies. Nevertheless, NYNEX applauds the Commission in striking a reasonable balance between the federal interest in establishing a level playing field for video providers and encouraging the growth of the MMDS industry with local health and safety interests. However, the proposed rule does afford state and local

² Each single family home and each multiple dwelling unit will require an antenna on the rooftop of the customer’s house or apartment building. The rooftop antenna will receive a microwave signal from the transmission tower. A downconverter then converts the signal to the appropriate frequency for transmission over inside wire to a set-top box. The set-top box will decrypt, decompress and convert the signal into the appropriate video and audio signals.

³ 1996 Act § 207.

⁴ Notice at Appendix A.

governments a level of flexibility which may have the unintended but practical effect of impeding the growth of the MMDS industry.

The Commission indicates that the presumption of unreasonableness could be rebutted by obtaining either i) a waiver from the Commission of the proposed rule upon a showing by the applicant of local concerns of a “highly specialized or unusual nature,” or ii) a “final declaration” from the Commission or a court of competent jurisdiction “that the state or local regulation is both necessary to accomplish a clearly defined and expressly stated health or safety objective, and is narrowly drawn as possible to accomplish that objective.”⁵ This language partially thwarts the intent of Congress.

Allowing a “court of competent jurisdiction” to review a regulation that seeks to protect the public from an alleged health or safety risk gives too much discretion to a non-expert decision-maker on matters that directly impact the congressional objective of encouraging access to wireless cable service. In addition, local litigation would likely have a chilling effect on customers subscribing to MMDS service.

Initial judicial review by the courts should be precluded and the Commission should be the first arbiter of whether the local regulation has a legitimate health and safety interest. The Commission, not a local court, is in the best position to balance federal policy with local needs and to do so in a uniform and non-discriminatory fashion. This will eliminate spurious local actions, brought on aesthetic grounds, that might have been more favorably received in a local court. To the extent that the Commission is concerned that it might be deluged with petitions normally presented to local tribunals, such concern would appear to be unfounded.

⁵ Id. at ¶ 8.

II. Full Preemption For Non-Governmental Restrictions Is Consistent With The 1996 Act

The Commission proposes to fully preempt non-governmental restrictions that might impair the delivery of MMDS service.

No restrictive covenant, encumbrance, homeowner's association rule, or other nongovernmental restriction shall be enforceable to the extent that it impairs a viewer's ability to receive video programming signals from over-the-air television broadcast or multichannel multipoint distribution service.⁶

To the extent that the intent of Congress in this area were somehow viewed as ambiguous or unclear, the Commission could reasonably expect significant opposition to this proposed rule from homeowner's associations and the real estate industry. The intent of Congress, however, could not have been clearer. The Commission correctly points to the House Committee Report which indicates that Section 207 is not limited to governmental restrictions like zoning ordinances. The intent was:

to preempt enforcement of State or local statutes and regulations, or State or local legal requirements; or restrictive covenants or encumbrances. Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners' association rules, shall be unenforceable to the extent [they are] contrary to this section.⁷

Congress could not have been any clearer. The Commission has been granted broad power under Section 207 of the 1996 Act to address not only conflicting governmental rules, but those deed covenants and homeowner association restrictions that impair the federal policy of promoting competition in video distribution.

The health and safety concerns of local homeowner associations can be addressed through local governmental regulations. Affording non-governmental bodies direct access to the

⁶ Id. at Appendix A, para.(c).

⁷ Id. at ¶ 10.

waiver process would likely give rise to countless petitions filed with the Commission, based more on aesthetic rather than arguable health and safety concerns. The Commission's proposed rule will prevent non-governmental bodies from imposing restrictions on, and impeding the development of, the nascent MMDS industry.

III. The Proposed Rule Affords The MMDS Industry With Sufficient
Flexibility As To The Shapes and Sizes of MMDS Antennas

The proposed rule implicitly recognizes that the shapes and sizes of MMDS antennas are not as finalized as they might be in other technologies. Concerning shape, the Commission correctly observes that MMDS antennas "usually" take one of three general forms -- a rounded disk, a parabolic sheet or a "Yagi" antenna.⁸ However, NYNEX cannot say at this time whether the antenna that it ultimately deploys will mirror these shapes exactly. NYNEX continues to work with various vendors who are designing the optimum antenna that will be both aesthetically pleasing and technically efficient. As such, the Commission was correct in not locking MMDS antennas into any one particular shape.⁹

Concerning size of MMDS antennas, the Commission points to the one meter protection afforded DBS receivers,¹⁰ and indicates that "[a]ntennas used to receive MMDS signals are generally smaller than one meter in diameter, and so are comparable to DBS dishes in size ..."¹¹ (Emphasis added). The size of MMDS antennas is a function of distance from the transmitter --

⁸ Id. at fn.15.

⁹ MMDS technology requires a clear line of sight from the transmission tower to an antenna on the customer's house or apartment building. As the Commission correctly points out, MMDS antennas may be mounted on "masts." (Notice at ¶ 7). In order to secure a clear line of sight, the height of the masts may vary, depending upon local topography and the height of the dwelling upon which the mast and antenna will be mounted. The Commission's proposed rules are flexible enough to accommodate masts of varying heights.

¹⁰ Notice. at ¶ 7.

¹¹ Id.

the further a customer is from the transmission tower, the larger the antenna that is required.¹² The Commission, by not mandating a one meter limitation, recognized that the size of the antenna may be larger than one meter in diameter and that the shape of the antenna may not lend itself to easy measurement.

The Commission seeks comment on when it might be appropriate to draw distinctions based upon size.¹³ Although most MMDS antennas in production today are generally no more than one meter in any direction, the establishment of an antenna size limitation might unnecessarily restrict the use of larger antennas that are located further from the transmission tower.

IV. Application of the Proposed Rule To Secure Multiple Dwelling Unit Access Is Unclear

The Commission's proposed rule addresses governmental and non-governmental regulations and seeks to provide sufficient flexibility to encourage the development of MMDS. What the proposed rule does not appear to address is the disparity that presently exists between MMDS and wireline video providers as pertains to access to multiple dwelling units ("MDU").

For video services delivered via MMDS, NYNEX must negotiate with each individual building owner to obtain rights to access MDUs, for purposes of either antenna placement or wiring. In contrast, cable companies often have a statutory right of access to MDUs. Such right of access exists in New York, Massachusetts, Rhode Island and Maine, provided the landlords receive reasonable compensation. In light of the thousands of MDUs in the NYNEX footprint, the cost and time to negotiate right of entry agreements with individual landlords when

¹² For example, one MMDS antenna used in the industry is the sectional grid parabolic antenna. An antenna of this type that might be used in an area close to the transmission tower might measure approximately 16" by 20". In contrast, an antenna that would be used in an area furthest from the

contrasted with the statutory right of access enjoyed by cable companies, puts MMDS providers at a significant competitive disadvantage.

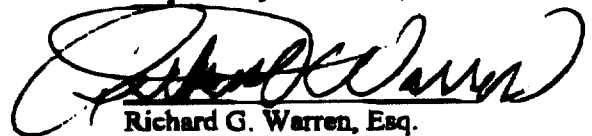
Due to conflicting interests among telephone companies, cable companies, alternative video providers and the real estate industry, support for a unified approach to granting access to MDUs may be difficult to achieve. Nevertheless, NYNEX will continue to work with key stakeholders in an attempt to reach an amicable solution.

This discussion is offered solely to highlight the disparity that presently exists between wireline cable companies and MMDS companies as pertains to MDU access. In the instant proceeding, the Commission should be cautious of any suggested modification of the proposed rule that would impede the growth of the MMDS industry and make the playing field even less level than it already is.

IV. Conclusion

The Commission's proposed rule is flexible enough to accommodate the various antenna shapes and sizes that can be found in the emerging MMDS industry. The proposed rule, with the suggested modifications, will help establish a level playing field with DBS and wireline companies as well as ensure that all Americans have the maximum choice in providers of video service. For the reasons set forth above, the rule should be adopted as modified.

Respectfully submitted,



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